

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 HALL CA-NV, LLC,

5 Plaintiff,

6 v.

7 LADERA DEVELOPMENT, LLC,

8 Defendants.
9
10

3:18-cv-00124-RCJ-CBC

ORDER

11 Before the court is Plaintiff Hall CA-NV, LLC's ("Hall") motion to modify the
12 subpoena duces tecum served on Kolesar & Leatham ("K&L") (ECF No. 40) by
13 Defendant Ladera Development, LLC ("Ladera"). Hall's motion asserts that the
14 subpoena served on K&L requires the disclosure of materials Hall claims are subject to
15 the attorney-client privilege, the common interest privilege, and/or the work product
16 doctrine. Hall seeks modification of the subpoena to prevent K&L from disclosing the
17 materials Hall claims are protected. Ladera opposed (ECF No. 43) and Hall replied (ECF
18 No. 44). The court granted Ladera leave to file a sur-reply. (ECF No. 50). The court
19 heard oral argument on November 9, 2018 (ECF No. 53). Having considered all the
20 above documents and oral argument, the motion is denied.

21 **I. FACTUAL BACKGROUND¹**

22 A. The Cal-Neva Redevelopment

23 The current case is one of many lawsuits involving Hall and Ladera arising from
24 the failed re-development of the Cal-Neva Lodge, which straddles the border of
25 California and Nevada on the shores of Lake Tahoe. The re-development began in 2014
26

27 ¹ The underlying facts of this case are extensive and known to the parties.
28 Therefore, this order will only recite those facts necessary and relevant to the current motion.

1 by the New Cal-Nevada Lodge, LLC. (“Cal-Neva”). (ECF No. 23, ¶ 9). The general
2 contractor on the project was Penta Building Group, LLC (“Penta”). (ECF No. 26, p. 9, ¶
3 12(c)).

4 On September 30, 2014, Hall and Ladera loaned \$29,000,000 and \$6,000,000,
5 respectively, to Cal-Nev for the project. (*Id.*, ¶¶10-13). Ladera obtained an insurance
6 policy from Old Republic National Title Insurance insuring its loan priority. (*Id.*, ¶ 14). On
7 this same date, Hall and Ladera entered into a separate agreement, known as the
8 “Intercreditor Agreement.” (ECF No. 23, ¶ 15). Pursuant to this agreement, Hall’s loan
9 was deemed the “Senior Loan” on the project while Ladera’s loan was deemed the
10 “Junior Loan.” (*Id.*, ¶ 16). The agreement also contained a variety of provisions that
11 defined the obligations, roles and rights of the parties in relation to one another and
12 imposed a variety of obligations and restrictions on Ladera. (*Id.*)

13 B. Penta Lien cases and Cal-Neva’s Bankruptcy Proceedings

14 All did not go as planned and the project failed resulting in extensive litigation
15 involving various entities associated with the project. For example, in April 2016, Penta
16 filed a complaint seeking foreclosure of its mechanic’s lien on the property in the Second
17 Judicial District Court in Washoe County, Nevada against Hall, Cal-Neva and others.
18 (See ECF No. 26, ¶ 25); *see also Penta Building v. New Cal-Neva Lodge, et. al.*, Second
19 Judicial District Court, Nevada, Case No. CV16-00837.² Penta also filed a similar action
20 against Hall in Placer County, California.³ These cases are collectively referred to as the
21 “Penta Lien cases.”

22 At oral argument, Hall indicated it tendered a claim for representation to Old
23 Republic for the claims on the Penta Lien cases in approximately August, 2016. In

24
25 ² The court takes judicial notice of this case and the filings in the litigation pursuant
to Fed. R. Evid. 201.

26
27 ³ At oral argument Hall indicated Ladera was also a party to these state court
cases. However, a review of the docket in the Washoe County case showed no
28 reference to Ladera nor was there any indication that Ladera made an appearance or
was named as a related party. (See Docket Sheet, *Penta Building v. New Cal-Neva
Lodge, et. al.*, Second Judicial District Court, Nevada, Case No. CV16-00837).

1 response, Old Republic selected the law firm of Kolesar & Leathem (“K&L”) to represent
2 Hall. At this point, Ladera was not involved these cases nor was it represented by K&L.

3 In the meantime, Cal-Neva filed for bankruptcy protection in California in July,
4 2016. (See ECF No. 23, ¶ 17). This case was ultimately transferred to United States
5 Bankruptcy Court under Case Number BK-N-16-51282-GWZ. (*Id.*) In the fall of 2016, the
6 Penta Lien cases were transferred to the bankruptcy court as adversary proceedings.
7 *See, for example, Penta Building v. New Cal-Neva Lodge, et. al.*, Second Judicial District
8 Court, Nevada, Case No. CV16-00837, Docket Entry Nos. 2, 3. The Nevada case was
9 assigned Case No. BK-N-16-05036-GWZ (known as the “Hall Nevada Adversary”), while
10 the California case was assigned Case No. BK-N-17-05003-GWZ (known as the “Hall
11 California Adversary”). (ECF No. 40-2, p. 6, ¶ 5). Both cases were consolidated under
12 the lead bankruptcy case. (*Id.*)

13 C. Joint Representation by K&L of Hall and Ladera

14 It is unclear exactly when Ladera became involved in the bankruptcy proceedings
15 outlined above. However, on March 8, 2017, K&L sent a letter to both Hall and Ladera
16 regarding its joint representation of both entities in relation to those proceedings. (ECF
17 No. 43-1). According to the letter, at that time, K&L represented Hall in the Hall Nevada
18 Adversary case and the Hall California Adversary case under the lead Cal-Nevada
19 bankruptcy case. (*Id.*, p. 2). However, K&L had also been asked to represent Ladera in a
20 separate adversary proceeding, which was also consolidated under the lead bankruptcy
21 case. (*Id.*, p. 3). This case was assigned Case No. BK-N-17-05007 (known as the
22 “Ladera Adversary case”).

23 Per the letter, the bankruptcy court had proposed and directed K&L to consolidate
24 ALL three of the adversary proceedings – referred to as the “Consolidated Adversary
25 Cases.” (*Id.*) Per K&L, the consolidation of these adversary proceedings would result in
26 K&L jointly representing both Hall and Ladera in the same matter. (*Id.*) K&L confirmed
27 that it believed it could jointly represent both parties because all three cases involved
28 “the same property and the same priority dispute with respect to the lien claimants.” (*Id.*)

1 K&L also confirmed both Hall and Ladera “would be taking the same position with
2 respect to the claims asserted” and the defense of the actions would be “aligned with
3 respect” to all aspects of the claims. (*Id.*)

4 K&L stated “the purpose of the letter [was] to describe the proposed joint
5 representation” of both parties and to “define the scope of said representation” in order
6 “to secure the consent” of the parties to it. (*Id.*) There was no limitation placed on the
7 scope of K&L’s representation of either party nor were there any assertions or claims
8 that K&L would have any independent relationship with either party. Both Hall and
9 Ladera signed and returned the letter to K&L confirming their consent to K&L’s joint
10 representation of both parties in the Consolidated Adversary Cases. Thus, by March 8,
11 2017, K&L jointly represented both Hall and Ladera in the bankruptcy cases outlined
12 above *without* limitation.

13 On August 14, 2017, Hall filed a lawsuit against Ladera in the Second Judicial
14 District Court in Washoe County, Nevada. *See Hall CA-NV, LLC v. Ladera Development,*
15 *LLC*, Case No. CV17-01526. (ECF No. 43-2; ECF No. 23, ¶ 20). In this case, Hall sought
16 an injunction against Ladera in order to prohibit it from taking certain actions in the
17 bankruptcy that Hall believed breached provisions of the Intercreditor Agreement. (ECF
18 No. 23, ¶¶ 19-20). Upon being advised of this new case, K&L sent a second conflict
19 waiver letter to both Hall and Ladera. (ECF No. 43-2).

20 In this second letter, K&L noted that Hall and Ladera had previously consented to
21 K&L’s *joint representation* of the entities in all of the adversary proceedings described
22 above. (*Id.*, p. 2). However, in light of the new lawsuit between the parties, K&L was
23 sending a second conflict waiver letter to again “confirm and memorialize” the actual and
24 potential conflicts of interest for the continued joint representation and to obtain “consent
25 to [K&L’s] continued representation” of both parties in the Consolidated Adversary
26 Cases. (*Id.*) Once again, “the purpose of the letter was to *confirm* the joint representation
27 of [both parties by K&L], to define the scope of said representation, and to secure
28 consent” from the parties for the continued joint representation. (*Id.*) (emphasis added). It

1 is important to note that the scope of the representation described in the second letter
2 remained identical to the scope of the representation described in the first conflict waiver
3 letter – i.e., that K&L would jointly represent Hall and Ladera in the Consolidated
4 Adversary Cases without limitation. (*Id.*, pp. 2-3.) Both Hall and Ladera signed the letter
5 and consented to the continued joint representation.⁴

6 In November 2017, a mediation was held in the bankruptcy proceedings and a
7 settlement was reached. (ECF No. 23, ¶¶ 22-23). However, according to Hall's Third
8 Amended Complaint, the settlement included all parties involved in the bankruptcy
9 proceedings except Ladera. (*Id.*, ¶ 22). At oral argument, Hall's counsel confirmed K&L
10 continued to jointly represent both Hall and Ladera throughout the pendency of the
11 bankruptcy proceedings, including the settlement negotiations.

12 D. Current Litigation and Subpoena to K&L

13 Hall filed the current lawsuit against Ladera in March, 2018. (See ECF No. 23,
14 Third Amended Complaint). Hall alleges claims against Ladera for breach of the
15 Intercreditor Agreement related to Ladera's alleged objections to the bankruptcy
16 settlement agreement. (*Id.*) Ladera answered Hall's complaint and asserted
17 counterclaims against Hall for fraudulent misrepresentation, negligent misrepresentation,
18 and declaratory relief. (ECF No. 26).

19 Ladera's counterclaims assert that Hall misrepresented material facts to induce
20 Ladera to provide its \$6,000,000 loan to Cal-Neva and enter into in the Intercreditor
21 Agreement. (*Id.*, pp.8-23). According to Ladera, Hall expressly represented to Ladera
22 that its loan would be subordinate only to Hall's loan. (See *id.*, pp. 12-16 ¶¶ 25-49).
23 However, Ladera alleges Hall knew Penta had already began work on the project and
24 had a perfected lien on the property making Ladera's loan subordinate to both Penta and
25 Hall. (*Id.*)

26
27 ⁴ During oral argument, Hall's counsel confirmed that K&L's representation and
28 relationship with Hall was related only to the Penta Lien Litigation and the Consolidated
Adversary Case. At not time did K&L represent Hall for any other purpose or in any other
matter than those described in the conflict waiver letters.

1 On August 16, 2018, Ladera served a subpoena duces tecum on K&L seeking
2 various documents related to its representation of Hall and Ladera in the Penta Lien
3 cases and the various bankruptcy proceedings. The subpoena seeks three broad
4 categories of documents. First, in Paragraphs 1 and 2 of the subpoena (“the State Court
5 Paragraphs”), Ladera requested K&L provide the “entire files” it maintained in relation
6 the Penta Lien cases in the Nevada state court action (Case No. CV16-00837) and the
7 Placer County, California state court action. (ECF No. 40-2, pp. 13-14, ¶¶ 1 & 2).

8 Next, in Paragraphs 3, 5, 6 and 7⁵ (“the Bankruptcy Paragraphs”), Ladera
9 subpoenaed the “entire files” maintained by K&L in relation to the Hall Nevada Adversary
10 case, the Hall California Adversary case, the Ladera Adversary case, the Consolidated
11 Adversary Cases, the lead Cal-Neva bankruptcy case, and the Cal-Neva bankruptcy
12 cases filed in California and Nevada prior to consolidation. (*Id.*, pp. 13-16, ¶¶ 3, 5-7).⁶
13 Ladera also subpoenaed any and all documents related to “all negotiations leading up to
14 and including” the settlement reached by Hall, Penta, Cal-Nevada and other entities in
15 the bankruptcy proceedings. (*Id.*, ¶ 7).

16 Finally, in Paragraphs 8, 9, and 10 (“the Catchall Paragraphs”), Ladera seeks any
17 other documents or communications, which were not covered by or included in the
18 above paragraphs. Specifically, Ladera subpoenaed: (1) any communications between
19 K&L, Hall, and/or Ladera related to the Penta Lien cases; (2) any communications
20 between K&L, Hall, and/or Ladera regarding any actual or potential conflicts of interest in
21 K&L’s representation of Hall and/or Ladera; and, (3) any documents or communications
22 related to how “Ladera’s interests were represented or protected during negotiations
23 leading up to and including the Compromise and Settlement Agreement” in the Cal-Neva
24 proceedings. (*Id.*, p. 8, ¶¶ 8-10).

25
26 ⁵ The subpoena appears to contain a typographical error in that it skips from
Paragraph 3 to Paragraph 5.

27 ⁶ The documents request related to the following bankruptcy case numbers: BK-N-
28 16-51282-GWZ; BK-N-16-05036-GWZ; BK-N-17-05003-GWZ; BK-N-17-5007-GWZ;
and, Eastern District of California Bankruptcy Case No. 16-2226.

1 E. Current Motion

2 After receiving the subpoena, K&L sent a letter to Ladera objecting to the scope
3 of the requests. (ECF No. 40-4). In addition, on August 28, 2018, Hall filed the current
4 motion to modify the subpoena served on K&L. (ECF No. 40). Hall argues the subpoena
5 must be modified to significantly narrow the items K&L would be required to produce.
6 According to Hall, these modifications are necessary because most of the documents
7 sought are protected by the attorney-client privilege, the common interest privilege
8 and/or the work product doctrine. (*Id.*, pp. 4-7). Hall's motion did not identify any specific
9 documents or communications that it claimed were specifically protected.

10 In response, Ladera argues that the court should deny Hall's motion in its entirety
11 because Hall's assertions of privilege fail. (See ECF No. 43). According to Ladera, K&L
12 jointly represented both Hall and Ladera in the cases identified in the subpoena and thus
13 Hall cannot claim any of the documents or communications are protected from
14 disclosure to Ladera. (*Id.*)

15 In reply, Hall contested Ladera's application of the joint representation exception
16 claiming that it did not apply to communications outside the scope of the joint
17 representation. According to Hall, this included communications between Hall and K&L
18 prior to the joint representation of Hall and Ladera as well as communications between
19 K&L and Hall's other attorneys (in house counsel Stephanie Byrd, Nathan Aman, and
20 Frank Wright) in which Ladera was not a party. Hall argued the joint representation
21 exception does not apply these communications and documents because: (1) the joint
22 representation exception does not apply to communications between K&L and Hall's
23 other attorneys that did not include Ladera or its representatives; (2) the scope of the
24 representation of K&L in relation to Hall and Ladera was altered by the second conflict
25 letter sent on August 15, 2017; and, (3) the joint representation exception should not
26 apply to these communications because Hall was forced to accept the representation by
27 K&L as it was selected by Old Republic.

1 At oral argument, the court initially indicated that it could not make a ruling on the
2 motion due to lack of information regarding the specific documents that Hall claimed
3 were privileged as well as the additional information and arguments provided at the
4 hearing. At that time, the court tentatively indicated that it would require Hall to provide
5 the court with the documents and items it claimed were privileged in order to allow the
6 court to review those items in camera prior to making a ruling.

7 Following oral argument, however, the court re-reviewed the filings in the case
8 and conducted extensive additional legal research. Based on this additional review and
9 research, the court finds that Hall's arguments lack merit and the motion should be
10 denied in its entirety.

11 **II. DISCUSSION**

12 **A. Standard for Modification of Subpoena**

13 Federal Rules of Civil Procedure allow parties wide latitude in seeking discovery
14 of "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ.
15 P. 26(b)(1). There are limits, however, on what a party may obtain through discovery.
16 For example, a court may quash or modify a subpoena where compliance with the
17 subpoena would require "disclosure of privileged or other protected matter" or "subjects
18 a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iii), (iv).

19 In this case, the contested subpoena was served on K&L, a non-party to this
20 litigation. Although K&L initially objected to the subpoena through a letter sent to Ladera,
21 K&L did not file the instant motion. Rather, Hall, the plaintiff in this action, filed the
22 current motion seeking to "modify" the subpoena issued to K&L pursuant to Federal Rule
23 of Civil Procedure 45(d)(3)(A)(iii).

24 Ordinarily, a party lacks standing to move to quash a subpoena that is served on
25 a third party. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 973–74 (C.D. Cal.
26 2010). However, courts have determined that a party does have standing to challenge a
27 subpoena served on a third party if the party can establish that it has a personal right or
28 privilege regarding the subject matter of the subpoena. *Kellgren v. Petco Animal*

1 *Supplies, Inc.*, Case No. 13-CV-0644, 2015 WL 11237636, * 3 (S.D. CA April 10, 2015).
2 Here, Hall claims K&L's compliance with the subpoena would require the disclosure of
3 privileged or protected material and "no exception or waiver applies." (ECF No. 40, p. 3).
4 As such, Hall has standing to seek to quash or modify the subpoena under these
5 circumstances.

6 B. Attorney-Client Privilege, Common Interest Privilege and
7 Work Product Doctrine

8 Hall's motion argues that the subpoena must be modified in various respects
9 because it requires K&L to disclose documents and/or communications that are subject
10 to the attorney-client privilege, the common interest privilege and/or the work product
11 doctrine. As this case is based upon diversity jurisdiction, Nevada law governs Hall's
12 privilege claims. *Kandel v. Brother Intern. Corp.*, 683 F.Supp.2d 1076, 1081 (C.D. Cal.
13 2010); see also Fed. R. Evid. 501.

14 Generally speaking, the attorney-client privilege protects confidential disclosures
15 made by a client to an attorney to obtain legal advice and an attorney's advice in
16 response to such disclosures. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir.1996)
17 (quotation omitted), cert. denied, 520 U.S. 1167 (1997). Under Nevada law, a client has
18 a privilege to refuse to disclose and to prevent any other person from disclosing
19 confidential communications: (1) between himself or his representative and his lawyer or
20 his lawyer's representative; (2) between his lawyer and the lawyer's representative; or,
21 (3) made for the purpose of facilitating the rendition of professional legal services to the
22 client, by him or his lawyer to a lawyer representing another in a matter of common
23 interest. See NRS 49.095.

24 The attorney-client privilege is a rule of evidence; it has not been held a
25 constitutional right. *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir.1985). "Because
26 it impedes full and free discovery of the truth, the attorney-client privilege is strictly
27 construed." *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18,
28 24 (9th Cir.1980). The party asserting the attorney-client privilege has the burden of

1 proving that it applies. *Id.* at 25. Moreover, a party claiming the privilege “must identify
2 specific communications and the grounds supporting the privilege as to each piece of
3 evidence over which privilege is asserted.” *United States v. Martin*, 278 F.3d 988, 1000
4 (9th Cir. 2002). Blanket assertions of attorney-client privilege are “extremely disfavored.”
5 *Id.* For the privilege to apply, “the communication must be between the client and lawyer
6 for the purpose of obtaining legal advice.” *Id.* The mere “fact that a person is a lawyer
7 does not make all communications with that person privileged.” *Id.* at 999. The party
8 asserting the privilege must, at a minimum, make a *prima facie* showing that the privilege
9 protects the information the party intends to withhold. *In re Grand Jury Investigation*, 974
10 F.2d 1068, 1071 (9th Cir.1992).

11 The “common interest privilege” (also known as the “joint defense doctrine”) is an
12 extension of the attorney-client privilege. *FSP Stallion 1, LLC v. Luce*, No. 2:08-CV-
13 01155-PMP, 2010 WL 3895914, at *16 (D. Nev. Sept. 30, 2010). Ordinarily, attorney-
14 client communications made in the presence of a third party would not be protected from
15 disclosure. *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007).
16 However, pursuant to the common interest privilege, attorneys for different clients
17 pursuing a common legal strategy may communicate with one another without the
18 protections of the attorney-client privilege being lost. *RKF Retail Holdings, LLC v.*
19 *Tropicana Las Vegas, Inc.*, No. 2:14-cv-01232-APG-GWF, 2017 WL 2292818, at *2 (D.
20 Nev. May 25, 2017). In order for this apply, however, three elements must be met: (1)
21 the communication is made by separate parties in the course of a matter of common
22 [legal] interest; (2) the communication is designed to further that effort; and (3) the
23 privilege has not been waived. *Id.* (internal citations and quotations omitted). However,
24 this privilege only applies, if the communications at issue are privileged in the first
25 instance. *Id.*

26 By contrast, “the application of the work product doctrine in diversity cases is
27 determined under federal law.” *Kandel*, 683 F.Supp.2d at 1083 (citing *Frontier Refining,*
28 *Inc. v. Gorman–Rupp, Inc.*, 136 F.3d 695, 702 n. 10 (10th Cir. 1998). The work product

1 doctrine protects from discovery “documents and tangible things that are prepared in
2 anticipation of litigation or for trial by or for another party or its representative (including
3 the other party's attorney, consultant, surety, indemnitor, insurer, or agent).” Fed. R. Civ.
4 Pro. 26(b)(3)(A). One of the primary purposes of the work product doctrine is to prevent
5 one party from exploiting another party's efforts to prepare for litigation. *Kandel*, 683
6 F.Supp.2d at 1083 (citing *Holmgren v. State Farm Mut. Auto Ins. Co.*, 976 F.2d 573, 576
7 (9th Cir. 1992); see also *RKF Retail Holdings*, 2017 WL 2292818, at *5 (describing work
8 product doctrine). The work product doctrine creates a qualified immunity, rather than a
9 privilege, and the qualification of the immunity is to be determined upon a showing of
10 necessity or good cause. *Kandel*, 683 F.Supp.2d at 1083. Like the attorney-client
11 privilege, the party claiming work product immunity has the burden of proving the
12 applicability of the doctrine. *Id.* at 1083–84 (citing *A. Farber & Partners, Inc. v. Garber*,
13 234 F.R.D. 186, 192 (C.D. Cal. 2006)).

14 C. Joint Representation Exception⁷

15 However, not all communications between an attorney and client are privileged or
16 subject to the work product doctrine. Information such as the identity of the client, the
17 amount of the fee, the identification of payment by case file name, the general purpose
18 of the work performed, and whether an attorney coached a client in his testimony is not
19 privileged. See, e.g., *United States v. Carrillo*, 16 F.3d 1046, 1050 (9th Cir.1994); *Clarke*
20 *v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir.1992).

21 Nevada has adopted various exceptions to the attorney-client privilege, including
22 the joint representation exception codified at NRS 49.115(5). Pursuant to this exception,
23 “a communication relevant to a matter of common interest between two or more clients if
24 the communication was made by any of them to a lawyer retained or consulted in
25 common, when offered in an action between any of the clients” is not subject to the

26
27 ⁷ This doctrine is known by a variety of interchangeable names. These include, but
28 are not limited to: the “joint-client privilege,” “joint client doctrine,” “common interest
exception” and so on. For clarity, the court will refer to this doctrine as the “joint
representation exception” throughout this order.

1 attorney-client privilege. NRS 49.115(5). Under Nevada law, “when a lawyer acts as the
2 common attorney of two parties, their communications to him are privileged as far as
3 they concern strangers, but as to themselves they stand on the same footing as to the
4 lawyer, and either can compel him to testify against the other as to their negotiations.”
5 *Livingston v. Wagner*, 23 Nev. 53, 42 P. 290, 292 (1895) (citing *In re Bauer's Estate*, 79
6 Cal. 304, 21 P. 759 (1889)).

7 Thus, “when former co-clients *sue one another*, the *default rule* is that all
8 communications made in the course of the joint representation are discoverable.... This
9 rule has two bases: (1) the presumed intent of the parties, and (2) the lawyer's fiduciary
10 obligation of candor to both parties.” *In re Hotels Nevada, LLC*, 458 B.R. 560, 571-572
11 (Bankr. D. Nev. 2011) (quoting *Teleglobe USA Inc. v. BCE, Inc.*, 493 F.3d 345, 366 (3d
12 Cir. 2007) (emphasis added). Courts have determined this exception extends to legal
13 files created by an attorney who represents co-clients, including any work product
14 documents contained therein. “The entire contents of those legal files belong jointly to
15 the clients in question, with each having an undivided ownership interest in, and equal
16 right of access to, all of those files.” *Scroggins v. Powell, Goldstein, Frazer & Murphy (In*
17 *re Kaleidoscope, Inc.)*, 15 B.R. 232, 244 (Bankr.N.D.Ga.1981), rev'd on other grounds,
18 25 B.R. 729 (N.D. Ga. 1982); *see also Matter of Michigan Boiler & Eng'g Co.*, 87 B.R.
19 465, 469 (Bankr. E.D. Mich. 1988) (rejecting work product assertions by law firm to
20 prevent trustee gaining access to legal files for jointly represented client). As such, the
21 attorney-client privilege and work product doctrines do not apply in disputes between co-
22 clients who are jointly represented by the same attorney in a particular dispute.

23 D. Application To Current Motion

24 With these principles in mind, the court will address each category of documents
25 sought by the subpoena.

26 1. *State Court Paragraphs - 1 & 2*

27 First, in the State Court Paragraphs 1 & 2, Ladera seeks the disclosure of the
28 “entire case files” K&L maintained during its representation of Hall in the Penta Lien

1 cases. (ECF No. 40-2, pp. 4-5, ¶¶ 1& 2). Hall has asserted these paragraphs must be
2 modified to exclude from disclosure any documents that are protected by the attorney-
3 client privilege, common interest privilege, and/or work product doctrine. (ECF No. 40, p.
4 5, ¶¶ 15).

5 As a starting point, Hall has the burden of proving that any of these privileges
6 apply in this case. *Weil*, 647 F.2d at 25. To meet this burden, Hall was required to
7 specifically identify the any communications or documents that it believed are privileged.
8 *Martin*, 278 F.3d at 1000. Hall has not identified any specific documents or items that
9 may be subject to the privilege. Rather, Hall has made a blanket assertion of these
10 privileges. Although this would ordinarily be insufficient to support the assertion of the
11 privilege, the court agrees with Hall that it is highly likely that there are communications
12 and documents within the K&L files related to the Penta Lien cases that may be
13 protected by the privileges identified in the motion.

14 Moreover, the court also agrees with Hall that the joint representation exception
15 would not apply to these documents. It is undisputed that K&L did not jointly represent
16 Ladera in the Penta Lien cases pending in Nevada and California state courts. As such,
17 K&L's representation of Hall in the Penta Lien cases is outside the scope of the joint
18 representation K&L later provided to Hall and Ladera.

19 In spite of the above, however, Hall has failed to meet its burden to establish that
20 State Court Paragraphs should be modified. First, contrary to the assertions of Hall, even
21 if there is protected material related to these files, those materials are protected from
22 disclosure by the express provisions of the subpoena. Specifically, under the heading,
23 "Instructions for Items to be Produced" located at Paragraph 2, page 3 of the subpoena,
24 K&L is permitted to withhold documents it believes are protected by the attorney-client
25 privilege or are protected by providing Ladera a privilege log detailing the documents
26 withheld and the basis for the withholding. Therefore, to the extent K&L believes that any
27 documents responsive to the State Court Paragraphs are subject to any privilege, K&L
28

1 should provide Ladera a privilege log, consistent with the directions provided in the
2 subpoena.

3 In addition, the court disagrees that the requests in the State Court paragraphs
4 are overbroad or would place an undue burden on K&L. The documents requested in the
5 State Court paragraphs are very limited. The Penta Lien cases were filed in state court in
6 April 2016. However, Hall did not tender a request to Old Republic for the appointment of
7 coverage counsel until August 2016. Thus, K&L's exclusive representation of Hall did not
8 begin until sometime thereafter. However, by October of 2016, the Penta Lien cases
9 were transferred to the bankruptcy court and by no later than March 8, 2017, K&L jointly
10 represented Hall and Ladera. Thus, K&L's exclusive representation of Hall in the Penta
11 Lien cases lasted, at most, five months prior to the joint representation commencing.

12 As the State Court paragraphs seek documents that span only a few months and
13 there is a specific protocol for protecting any privileged materials contained within the
14 subpoena, the court finds that there is no basis to modify the State Court Paragraphs.

15 2. *The Bankruptcy Paragraphs - 3, 5, 6 & 7*

16 Next, in Bankruptcy Paragraphs 3, 5, 6, and 7, the subpoena seeks the "entire
17 case" files maintained by K&L in relation to its representation of Hall and Ladera in the
18 various bankruptcy proceedings, including the adversary proceedings and the lead
19 bankruptcy cases. (ECF No. 40-2, pp. 5-7). Here again, Hall argues these paragraphs
20 should be modified to preclude the disclosure of documents it asserts are subject to the
21 attorney-client privilege, common interest privilege, and/or work product doctrine related
22 to communications between Hall's other attorneys and K&L in which Ladera was not a
23 party. However, Hall has failed to establish that these paragraphs should be modified.

24 In this instance, the record establishes that by no later than March 8, 2017, K&L
25 jointly represented both Hall and Ladera in each of the cases identified in the Bankruptcy
26 paragraphs. In fact, each of the case numbers were explicitly referenced in the conflict
27 waiver letters sent by K&L on March 8, 2017 and August 15, 2017 to Hall and Ladera.
28 (ECF Nos. 43-1; 43-2). In these letters, K&L expressly sought an affirmative waiver of

1 any conflicts by both Hall and Ladera in order to permit K&L to jointly represent the
2 parties in those cases – without limitation. (*Id.*) Therefore, all of the documents
3 requested by the Bankruptcy paragraphs fall within the scope of the joint representation
4 starting no later than March 8, 2017 and continuing until the cases were resolved.
5 Although Hall may be able to assert a privilege in these documents as to a third party,
6 these privileges do not apply in relation to Ladera. *Livingston*, 42 P. at 292; NRS
7 49.115(5). In addition, Ladera is entitled to complete copies of the case files K&L
8 maintained in relation to this joint representation. *In re Kaleidoscope, Inc.*, 15 B.R. at
9 244; *Matter of Michigan Boiler & Eng'g Co.*, 87 B.R. at 469; NRS 7.055 (requiring
10 attorney to deliver to client its entire file upon demand and payment of outstanding
11 fees).⁸

12 The Court rejects Hall's arguments seeking to limit the applicability of the joint
13 representation exception to the documents requested in the Bankruptcy Paragraphs
14 after the joint representation commenced. First, Hall's argument that the joint
15 representation exception does not apply to communications made between K&L and
16 Hall's other attorneys that were made outside the presence of Ladera or its
17 representatives is not supported. Hall has not provided, nor has the court been able to
18 locate, any case that holds that the attorney-client or work product doctrine bars
19 disclosure to a co-client of communications made to the common attorney unless the
20 other co-client is present at the time of the communication. To the contrary, a review of
21 the applicable law in Nevada and other jurisdictions reaches the opposite conclusion.

22
23
24 ⁸ It is unclear exactly when K&L began its joint representation of Hall and Ladera.
25 To the extent K&L only represented Hall in the bankruptcy proceedings following the
26 transfer of the Penta Lien cases from state court in the Fall of 2016 until March 8, 2017,
27 any privileged communications or protected documents would fall outside the scope of
28 the joint representation exception. Thus, there may be some documents or
communications that would be protected from disclosure. This alone, however, does not
require a modification of the Bankruptcy Paragraphs. Rather, as explained in connection
with the State Court paragraphs above, the subpoena provides specific direction and
instructions for how K&L should address privileged documents for that short time period.

1 NRS 49.115(5) specifically states that the attorney-client privilege does not apply
2 to “a communication relevant to a matter of common interest between two or more
3 clients if the communication *was made by any of them* to a lawyer retained or consulted
4 in common, when offered in an action between any of the clients.” Thus, the statute itself
5 makes clear that any communication made to a joint attorney by any co-client is not
6 subject to claims of privilege when offered in an action between any of the clients. There
7 is no limitation in the statute to communications made outside the presence of any other
8 co-clients.

9 Moreover, a review of the case law from various jurisdictions also supports this
10 conclusion. In those cases, it is widely recognized that the joint representation exception
11 applies to *all* communications made by a co-client to the joint attorney – regardless of
12 whether both parties are present when the communications occur. *See e.g., Ashcraft &*
13 *Gerel v. Shaw*, 728 A.2d 798, 813 (Md.App. 1999) (rejecting claim that joint
14 representation exception only applies to communications made to joint attorney when
15 both clients are present); *Gottwald v. Medinger*, 257 A.D. 107 (4th Dep’t, New York
16 1939) (no privilege to communications made by borrower to an attorney that represented
17 both a borrower and lender in arranging loan); *Henke v. Iowa Home Mut. Cas. Co.*, 87
18 N.W.2d 920, 923-925 (Iowa 1958) (holding that attorney-client privilege did not apply to
19 any communications between co-clients and a joint attorney for parties regardless of
20 whether both parties were present during the communication).

21 The court also rejects Hall’s argument that the documents and communications
22 between Hall’s other attorneys and K&L after August 15, 2017 are outside the “scope” of
23 the joint representation because the second conflict waiver letter altered the scope of the
24 joint representation. (ECF No. 43-2). Nothing in the letter states, or even insinuates, the
25 scope of K&L’s joint representation was altered or changed by the letter or the filing of
26 the lawsuit by Hall against Ladera. In fact, a review of the letter confirms K&L was
27 advising Hall and Ladera that the scope of the joint representation would remain
28

1 *unchanged* – in spite this new development – provided the parties agreed to waive any
2 possible conflicts of interest. (*Id.*)

3 The court further rejects Hall’s argument, asserted for the first time at oral
4 argument, that the joint representation exception should not apply to the
5 communications between K&L and Hall’s other attorneys because Hall did not select
6 K&L to represent it. According to Hall, because it had “no choice” but to accept K&L as
7 its insurance coverage counsel, this somehow limits the application of the joint
8 representation exception in this case.

9 Hall provided no case law to support this argument. Following the argument,
10 however, the court located cases that reject the assertion that the joint representation
11 does not apply, or applies differently, when the attorney who represents the joint parties
12 is selected by an insurance company. See *e.g.*, *Globe One Specialty Mut. Ins. Co. v.*
13 *Congregation Bais Yisroel*, 381 F.Supp.2d 267. 280 (S.D.N.Y. 2005) (noting that
14 communications between an insured and counsel supplied by the insurer are not
15 privileged in an action between insured and insurer); *Waste Management, Inc. v. Int’l*
16 *Surplus Lanes Ins. Co.*, 579 N.E.2d 322, 329 (Ill. 1991) (finding joint representation
17 exception applied to where the attorney was not hired by, and did not have direct
18 communication with, the insurer where the attorney acted for the mutual benefit of both
19 the insured and the insurer); *Henke*, 87 N.W.2d at 923 (rejecting argument that selection
20 of attorney by the insurance company alters or modifies the relationship between the
21 attorney and client when jointly representing the insurer and the insured; holding no
22 privilege in communications between the insurer and coverage counsel that did not
23 include insured); *Vicor Corp. v. Vigilant Ins. Co.*, 674 F.3d 1, (1st Cir. 2012) (no privilege
24 in controversy between insured and the insurer in joint representation by coverage
25 counsel).

26 Therefore, the court rejects Hall’s arguments that the communications between
27 K&L and Hall’s outside counsel are protected from disclosure to Ladera. Rather, after an
28 extensive review, the court finds that the joint representation exception applies to *all*

1 documents and communications throughout the entirety of K&L's joint representation of
2 Hall and Ladera without exception once the joint representation commenced. As such,
3 there is no basis to alter or modify the subpoena in relation to the Bankruptcy
4 Paragraphs 3, 5, 6 and 7.⁹

5 3. Catchall Paragraphs – 8, 9 & 10

6 Finally, in the Catchall Paragraphs 8, 9, and 10 overlap with of the various
7 paragraphs addressed above and are intended to capture any additional documents that
8 would not otherwise be included in the preceding paragraphs. (ECF No. 40, p. 7, ¶ 20).
9 For the same reasons explained above, Hall has failed to establish that these
10 paragraphs should be modified.

11 First, Paragraph 8 is intended to capture any additional documents or
12 communications related to K&L's representation of Hall in the Penta Lien cases that are
13 not otherwise found within the case files. The issues related to these documents and
14 communications are the same as those related to the State Court Paragraphs. For the
15 same reasons stated in Section II(D)(1), the court finds modification of this paragraph is
16 not appropriate.

17 Next, Paragraphs 9 and 10 are intended to capture any additional documents or
18 communications between K&L, Hall, and/or Ladera related to K&L's joint representation
19 of Hall and Ladera, any discussions of the various conflicts, and K&L's actions taken
20 during the settlement negotiations related to Ladera's interests. These issues overlap
21 and present the same issues as the issues related to the Bankruptcy Paragraphs.
22 Therefore, for the same reasons stated in Section II(D)(2), the court finds that
23 modification of these paragraphs is not warranted.

24
25 ⁹ Hall argued that the documents and communications related to the settlement of
26 reached in the bankruptcy proceeding was prohibited from discovery pursuant to Federal
27 Rule of Evidence 408. However, at oral argument, Hall acknowledged that K&L jointly
28 represented by Hall and Ladera throughout the pendency of the bankruptcy
proceedings, including the settlement negotiations. Therefore, the joint representation
exception applies to the documents and communications related to the settlement
negotiations as well.

III. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff's motion to modify the subpoena (ECF No. 40) is **DENIED** in its entirety.

IT IS FURTHER ORDERED that K&L shall have thirty (30) days from the entry of this order to comply with the subpoena issued by Ladera on August 16, 2018.

DATED: November 30, 2018.


UNITED STATES MAGISTRATE JUDGE